Statement of Congresswoman Tammy Baldwin
On H.R. 3313, the "Marriage Protection Act"

House Judiciary Committee Markup
July 14, 2004

Mr. Chairman, today this committee is poised to mark up legislation that, if it were to become law, could do grave damage. I strongly oppose HR 3313 and the Chairman's Amendment in the Nature of a Substitute to the underlying bill. I would urge the members in the majority to reconsider this extreme approach to addressing the issue of same sex marriage and their concerns about so-called judicial activism. The consequences of enacting HR 3313 far exceed the stated objective of the Majority and would seriously undermine the faith of the American people in this Congress, in the courts, in the principle of separation of powers, and in the notion of checks and balances.

When writing the Constitution, the Founders wisely decided that the best way to secure our freedom and liberties was to establish three co-equal branches of government—the Congress, the Executive and the Supreme Court. These three branches of government have different but overlapping authorities to ensure that each branch is subject to checks and balances. Not only will there be times that they will be in disagreement about a particular issue or law, the structure of the Constitution makes these conflicts inevitable.

As the Chairman knows well, the University of Wisconsin is dedicated to the proposition that it is through the "continual and fearless sifting and winnowing by which alone the truth can be found." In the context of our laws, this sifting and winnowing occurs at many points in the process. In Congress, we hold hearings, markups, and floor votes and we offer amendments, we hold conference committees and we issue reports. The Executive proposes legislation, engages in public debate, signs and vetoes legislation. The Court then interprets, evaluates, settles disputes and invalidates laws based on bedrock principles enshrined in our Constitution. Many people know the expression, if you love sausage or laws, you best avoid watching either get made… It's messy. But, it is through the process, which includes the court, that we sift and winnow our laws to improve them and ensure they are fair and just for all Americans.

It is a terrible mistake to try to strip one branch of government from its involvement in evaluating particular laws. This is particularly true when considering the Courts, whose Constitutional and historic role is to defend our liberties.

Fortunately for our citizens, it is my belief that HR 3313 is unconstitutional and, if it ever becomes law, will ultimately be invalidated.

Mr. Chairman, during the Constitution Subcommittee's hearing on this issue on June 24, the majority and minority each invited legal scholars to address the questions that the bill's author Mr. Hostetler posed to us just a few minutes ago: "Can Congress do this?" and "Should Congress do this?" On the former question, the two witnesses disagreed, although even the majority witness Professor Martin H. Redish, the Louis and Harriett Ancel Professor of Law and Public Policy at Northwestern University, noted that "Congress quite clearly may not revoke or confine federal jurisdiction in a discriminatory manner." But on the latter question, "Should Congress do this?" the legal scholars agreed that we should not.

Let me quote Professor Redish's testimony on this question because it is compelling: "I firmly believe that Congress should choose to exercise this power virtually never *[emphasis added]*. There has long existed a delicate balance between the authority of the federal judiciary and Congress, and the exclusion of substantively selective authority from all federal courts seriously threatens that balance."

This legislation is unnecessary, unconstitutional and unwise. It should be rejected.